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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-5134

ORIGINAL COPY

MARY GORMLEY,
Petitioner,

V.

DIRECTOR, CONNECTICUT STATE DEPARTMENT PROBATION, ET AL,
Respondents

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF THE CASE

The appellant was convicted by a jury of two counts: one in violation of Section 53a-182(a)(2) of the Connecticut General Statutes and the other in violation of Section 53a-183(a)(3). On appeal, the Appellate Session of the Superior Court reversed the conviction on the first count (disorderly conduct) but affirmed the conviction on the second count (harassment). The conviction on the first count was overturned on the reasoning that as applied to speech and in the absence of a narrowing instruction to the jury, a section of the disorderly conduct statute was overbroad. State v. Anonymous, (1978-4), 34 Conn. Sup. 689, 389 A.2d 1270, 1272-73 (Conn.App. 1978). Distinguishing the use of the telephone, however, that court upheld the harassment conviction. State v. Anonymous, supra at 389 A.2d 1273-74. The Connecticut Supreme Court denied certification. State v. Gormley, 174 Conn. 803, 382 A.2d 1332 (1978).

Having exhausted state remedies, the petitioner sought federal collateral relief in the United States District Court for the District of Connecticut. The District Court upheld the constitutionality of the statute. (See Document C appended to the petition to this Court). The United States Court of Appeals for the Second Circuit affirmed the District Court. (See Document A appended to the petitioner).

The evidence underlying the convictions was stated in the opinion of the Appellate Session and may be summarized as follows. On the day in question the complainant and her friend were driving to work when they passed the defendant. When the complainant turned into the parking lot of the restaurant where she worked, the defendant drove up closely behind her. When the complainant got out of her car, the defendant shouted that she was a "tramp", that her mother was a whore and had gone to bed with the defendant's husband,

and that the defendant was going to "get" the complainant. The complainant and her friend walked into the restaurant. On these facts, the defendant was convicted of disorderly conduct.

Later, on the same evening, the defendant telephoned the complainant at the restaurant where the complainant worked; over the telephone, the appellant repeated "substantially the same insults." State v. Anonymous, supra, 1271. This event was the basis for the harassment charge.

In charging the jury, the court read the pertinent part of Section 53a-183 (3) of the Connecticut General Statutes: "A person is guilty of harassment when with intent to harass, annoy or alarm another person, he (or she) makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm.

"So the first element in this particular offense is that there must be an intent and it must be proven by the State beyond a reasonable doubt... [the court went on to define specific intent.]" [App. 2d Cir. 17].

> ...
> The next phraseology in the statute is that: "A person is guilty when with intent to harass, annoy, or alarm." The term harass has been defined in Webster's Dictionary to mean "to trouble, worry, or torment another." The word annoyance is a noun which has been defined as "to irritate, or to vex; to bother, as by repeated actions." And to alarm has been defined as "to make suddenly afraid of or anxious; frightening."
>
> So the test again is what people of common intelligence and common sense would understand would be a telephone call made in a manner likely to cause or have a direct tendency to cause annoyance or alarm. So if you find in this case that the defendant made a telephone call with that intention in mind to harass, to annoy, and in fact that that telephone call, in the conversation, harassed and annoyed another person, then, under those circumstances, you would find the defendant guilty of that offense... (App. 18).

The Appellate Session found no critical infirmity in that portion of the charge. State v. Anonymous, supra, 1273.

ARGUMENT

The petitioner argues that this Court should grant certiorari because the decision of the Second Circuit is contrary to prior decisions of this court and to those of several other state courts. While it may be true that some state courts have overturned their diverse statutes,[1] it is submitted that there is no conflict between the decision below and those of this Court and other Circuits.

The petitioner argues essentially that Section 53a-183(a)(3), which prohibits certain use of the telephone, is unconstitutionally overbroad in that it could be used to prohibit constitutionally protected speech. The respondent disagrees. Though conversation may be relevant, it is not speech itself which is punished, but rather the making of a harassing phone call with the requisite intent. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968).

The context of the utterance may be balanced against the First Amendment

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[1] Decisions from state jurisdictions have varied, undoubtedly because of differences in the language of the various statutes as well as jurisprudential concerns. Compare, e.g., State v. Dronso, 279 N.W. 2d 710 (1979)("with intent to annoy another, makes a telephone call ...") and State v. Blair, 601 P.2d 766 (Or.1979), with State v. Brown, 266 S.E.2d 64 (S.C.1980); Kinney v. State, 404 N.E.2d 49 (Ind. App. 1980); State v. Elder, 382 So.2d 687 (Fla.1980); Constantino v. State, 255 S.E.2d 710 (Ga.1979); People v. Weeks, 591 P.2d 91 (Colo.1979); Lusch v. State, 387 A.2d 306 (Md.App. 1978).

utterances sought to be protected, For example, in Greer v. Spock, 424 U.S. 828 (1976), a regulation forbidding political speeches at a military base was upheld; in Adderley v. Florida, 385 U.S. 39 (1966), a trespass conviction for picketing at a jail was upheld; in Grayned v. City of Rockford, 408 U.S. 104 (1972), it was held permissible to regulate noise in the vicinity of schools. Thus, even if certain conduct may include a speech element, the mere possibility that communication may be involved does not necessarily outweigh a legitimate competing consideration.

Here, of course, the major competing consideration is privacy. In several closely analogous cases, this Court has recognized such an interest. In Rowan v. United States Post Office Department, 397 U.S. 728(1970), a procedure whereby people could avoid the delivery of "junk mail" was upheld: a rationale for the decision (p.736) was the right to be left alone. In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), an ordinance forbidding political advertising on a busline was upheld, at least partly because of the captive nature of the potential audience.

More recently, this Court decided F.C.C. v. Pacifica Foundation, 438 U.S 726 (1978). A radio station broadcast material which was offensive and indecent, though not obscene, and the F.C.C. indicated that it may consider such broadcasts unfavorably in its licensing process. The constitutional issue was whether the First Amendment denies government the power to restrict public broadcast of indecent language. In holding that it does not, the Court noted that no language was entitled to absolute constitutional protection and that broadcasting was different from other media because of its pervasive penetration into the home.

> Outside the home, the balance between the offensive speaker and the unwilling audience requires the offended listener to turn away. See Erzoznik v. Jacksonville, 422 U.S. 205, 95 S.Ct.2268. 45 L.Ed.2d 125. As we noted in Cohen v. California:

> "While this court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue...we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'" 403 U.S., at 21, 91 S.Ct., at 1786. The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity; "from engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called member; "and from" us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act, Amendments, Pub.L. 95-109, 91 Stat. 877. F.C.C. v. Pacifica Foundation, supra, 749.

The Second Circuit relied on United States v. Lampley, 573 F.2d 783 (3d Cir. 1978), which upheld a federal telephone abuse statute which parallels quite closely the Connecticut provision.

> The appellant has not claimed, nor could he successfully do so, that it is beyond the power of the Congress to impose criminal sanctions on the placement of interstate telephone calls to harass, abuse or annoy. Not all speech enjoys the protection of the first amendment...and in enacting Section 223, the Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable purposes...[T]he nature of the conversation can have no bearing on the constitutionality of the section since its narrow intent requirement precludes the proscription of mere communication. United States v. Lampley, supra, 787.

The court went on to note that the statute's specific intent requirement negated a claim that the statute was unconstitutionally vague.

The petitioner's overbreadth argument, of course, is premised upon the possible application of the criminal statute to constitutionally protected speech. It is not argued, as it was below, that the petitioner actually

was prosecuted for protected speech. While the respondent recognizes that in the First Amendment context a petitioner may at times assert vicariously the rights of others; see, e.g., Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974); the overbreadth doctrine does not allow statutes to be challenged facially on a chimerical claim that a statute could be unconstitutionally applied in a hypothetical situation:

> [W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.
> Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

It is urged that the opinion of the Second Circuit is fully in accord with decisions of this Court, in that the statute regulates conduct and the possibility of a chilling effect is remote. The decision is consistent with United States v. Lampley, supra.

Various state court decisions depend to a great degree on the specfic language of a given statute. While the various decisions are diverse, the great majority seem to be consistent with the decision below. Illinois provides an illustrative example. In People v. Klick, 362 N.E.2d 269 (1977) the Illinois Supreme Court invalidated a statute which prohibited making a telephone call "with intent to annoy another." Two years later, in People v. Parkins, 396 N.E.2d 22 (1979), the Illinois Supreme Court upheld a substituted statute which prohibited making a telephone call "with intent to abuse, threaten or harass any person..." This court dismissed a petition for certiorari for lack of a substantial federal question." _____ U.S. _____, 27 Crim.L.Rep. 4055 (April 21, 1980). It is suggested that the possibility of abuse of the Connecticut statute is so remote that certiorari should be denied.

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PROOF OF SERVICE

This is to certify that on October 20, 1980, a copy of the foregoing was mailed to Joseph Rubin, Esquire, 487 Main Street, Suite 2, Hartford, CT 06103

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